No. 89-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SUFFOLK COUNTY TREASURER,

Petitioner,

—v.—

LINCOLN SAVINGS BANK, FSB, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT LINCOLN SAVINGS BANK, FSB IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court invoke its certiorari jurisdiction to reconcile a purported conflict between the decision below of the Second Circuit Court of Appeals and a decision of the Fourth Circuit Court of Appeals as to whether, despite the automatic stay provision of the Bankruptcy Code, a taxing authority may obtain priority lien status for post-petition, unaccrued, future tax claims on the basis of an alleged ever-present property interest in collecting real estate taxes where:

(a) the court below held only that there is no such interest manifested by state or local law in this case, and thus premised its decision on adequate and independent state law grounds;

(b) the holding below is not in conflict with the cited Fourth Circuit decision, which is based on an interpretation of different local law; and

(c) to the extent the decision below contains *dicta* critical of the Fourth Circuit decision, it is consistent with clear Congressional intent and has been recently endorsed by the only other Court of Appeals to reach the issue?

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RULE 28.1 STATEMENT

Lincorp, Inc. is the parent company of respondent Lincoln Savings Bank, FSB. Lincorp, Inc. is, in turn, a wholly-owned subsidiary of Unicorp American Corporation, a public company, the majority of which is owned by Unicorp Canada Corporation, also a public company.

Several other pre-petition secured creditors, specifically, American Home Insurance Co., National Union Fire Insurance Co. of Pittsburgh, Pa., New Hampshire Insurance Co. and T. Frederick Jackson, Inc., were parties to the proceedings below and join with Lincoln in this brief. The Rule 28.1 statement as to these parties is as follows:

American International Group Inc. is the parent of all three insurance company respondents, who have no affiliates other than wholly-owned subsidiaries of American International Group Inc.

Olsen Industries, Inc. is the parent company of respondent T. Frederick Jackson, Inc.

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Respondent Lincoln Savings Bank, FSB ("Lincoln"), joined by respondents American Home Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa. and New Hampshire Insurance Company (collectively, the "AIG Insurance Companies") and T. Frederick Jackson, Inc. ("Jackson"), respectfully submits that the petition does not present any issue meriting review by this Court.

In this bankruptcy matter, petitioner asks this Court to review the judgment and order of the Court of Appeals for the Second Circuit denying secured and priority status for several years of post-petition real estate tax claims which, when the bankruptcy petition was filed, were not due and payable and as to which the taxing process had not even begun. The court held that these post-petition claims were not secured, relying on the automatic stay provision of the Bankruptcy Code, which bars

"any act to create, perfect or enforce any lien" once a bankruptcy petition is filed. The court rejected petitioner's argument that it had an "ever-present interest" in collection of future real estate taxes, allowing post-petition creation and perfection of liens with priority over pre-petition mortgages on the real property in question under an exception to the automatic stay provision.

The petition fails to mention that, for petitioner to prevail on the merits, this Court would have to reverse the Court of Appeals on a question of New York state and local law. The Court of Appeals held that under the relevant New York State and Suffolk County tax laws, petitioner had no such "ever-present interest" and that the exception relied on by petitioner thus did not even arguably apply to this case. Unnecessary to the court's decision was its *dicta* that, in any event, any such interest would not, as a matter of federal law, justify the post-petition creation and perfection of liens as to future tax years. It is this *dicta* that petitioner would have this Court review, but to even reach the question this Court, contrary to its stated practice, would have to review and reverse the court below on an issue of local law.

For the same reason, the claimed conflict between the decision below and that of the Fourth Circuit in *Maryland Nat'l Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983) is wholly illusory. In *Maryland Nat'l Bank*, the court relied heavily on Maryland law in concluding that the taxing authority did have an "ever-present interest" in collecting future real estate taxes. Hardly emblematic of a conflict, the holdings of the two cases represent differences between Maryland and New York law. Moreover, *Maryland Nat'l Bank* had no occasion to address the situation presented here, where claims are asserted as to several future tax years with respect to which the taxing process had not commenced at the time of the bankruptcy petition's filing. Indeed, the Fourth Circuit's rationale indicates that it might well have viewed such a situation as did the court below.

Lastly, the *dicta* in the decision below is entirely correct. Congress simply did not intend to allow taxing authorities to legislate their way around the automatic stay by claiming the right to perfect, post-petition, "ever-present interests" in property for the duration of a bankruptcy proceeding. The exception to the automatic stay relied on by petitioner was intended solely to protect a creditor who, unlike the petitioner in this case, gave value prior to the filing of a petition but, surprised by the intervention of bankruptcy, was unable to perfect a lien which he would otherwise have been able to perfect under applicable state law. The only other court of appeals to address this issue, the Third Circuit in a decision rendered after that of the court below, has ringingly endorsed the federal law views of the Second Circuit.

STATEMENT OF THE CASE

1. The Facts

This case was presented to the courts below on the basis of stipulated facts, which are recounted in the opinions of the Court of Appeals (App. at 7a-14a) and the District Court (App. at pp. 43a-47a).[1] We briefly summarize them here.

This litigation arises out of the bankruptcies of two debtors: Parr Meadows Racing Association ("Parr Meadows"), and Ronald J. Parr ("Parr"), at all relevant times the chairman of the board of Parr Meadows. On October 17, 1977, Parr Meadows filed an original petition seeking an arrangement pursuant to Chapter 11 of the Bankruptcy Act. The principal asset of Parr Meadows was the Parr Meadows Racetrack (the "Racetrack"), located in Yaphank, New York in Suffolk County. Prior to the filing, the Racetrack was encumbered by a mortgage in the principal amount of $14 million, now held by Lincoln, which was given by Parr Meadows and perfected against the Racetrack property on August 26, 1976; by a mortgage held by the AIG Insurance Companies in the principal amount of

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1 Citations to "App." are to the appendix filed with the petition.

$4 million, also given by Parr Meadows and perfected on August 26, 1986; and by a chattel mortgage held by Jackson dated February 8, 1977 relating to certain lighting, pari-mutuel and other electrical equipment at the Racetrack. (App. at 7a-9a, 43a-45a).

Parr Meadows voluntarily dismissed the petition on June 12, 1979, the same day that Parr filed a petition for relief pursuant to Chapter 11 of the Bankruptcy Act. Two days later, Parr, in his capacity as chairman of Parr Meadows, caused the Racetrack to be conveyed from Parr Meadows to himself. On April 27, 1980 the Appellate Division of New York Supreme Court held that this conveyance had been made with actual intent to hinder and delay creditors of Parr Meadows and thereby determined that the Racetrack belonged in the estate of Parr Meadows. In the interim, on October 4, 1979, Parr Meadows filed a second petition, this time pursuant to Chapter 11 of the newly effective Bankruptcy Code (the "Code"). (App. at 7a-8a, 43a-44a).

On May 10, 1985, James Barr and Harvey L. Goldstein, who had been appointed as trustees of Parr Meadows and Parr, respectively, put aside the dispute as to ownership and together sold the Racetrack to an entity called Suffolk Meadows Corporation, receiving approximately $750,000 and a note and mortgage on the Racetrack in the amount of $10,750,000. The property was sold free and clear of liens, which attached to the funds and the note and mortgage held by the trustees. In response to petitioner's opposition to the transaction, the Bankruptcy Court ordered the trustees, as an interim measure, to pay $500,000 to petitioner in partial reduction of petitioner's claim for real property taxes, more fully described below. Thereafter in June 1987, the Bankruptcy Court approved the sale of the note and mortgage held by the trustees for the discounted sum of $7.5 million dollars in cash, all liens again attaching to the proceeds. As the only remaining asset of the estates, this $7.5 million was all that was available to pay the claims of the secured creditors, which aggregated in excess of $18 million in principal amount alone. (App. at 9a-12a, 44a-45a).

2. The Bankruptcy Court Proceedings

In connection with the sale of the Racetrack note and mortgage in 1987, proceedings were initiated to determine the priority and extent of the liens that would attach to the proceeds. Petitioner, citing in relevant part an exception to the automatic stay in Sections 362(b)(3) and 546(b) of the Code, asserted secured status and priority over pre-petition secured creditors for all unpaid real estate taxes, plus interest and penalties on those taxes, whether the taxes had become payable before or after the filing of the petition.

Specificially, petitioner claimed secured, priority status for unpaid real estate taxes assessed against the Racetrack property for the tax years 1978-79, 1979-80, 1980-81, 1981-82, 1982-83 and 1984-85, interest on those taxes at the rate of 1% per month and statutory penalties.[2] The total amount of the unpaid tax included in the petitioner's claim was $2,245,978.80. All but $327,231.45 of this amount—the tax owing for the 1978-79 tax year, which was not contested—was for sums that did not become due and payable until after the filing of the operative Parr Meadows petition in October, 1979 or the Parr petition in June, 1979. Indeed, with the exception of the tax for 1979-80, the tax valuation process had not even begun for any of the tax years at issue at the time the petitions were filed. Petitioner also claimed interest and penalties on all unpaid taxes which, at the time of submission to the Bankruptcy Court, aggregated more than $1.6 million. (App. at 10a-11a, 45a-46a).[3]

Joined by the other secured creditors, Lincoln objected to petitioner's claim and contended that petitioner should have

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2 Petitioner's claim did not include the 1983-84 tax or interest on that tax because petitioner had applied the $500,000 it received in 1985 to eliminate those charges.

3 Under the authority of this Court's decision in *United States v. Ron Pair Enterprises*, 109 S. Ct. 1026 (1989), the court below held that petitioner would be entitled to add to its claim post-petition interest with respect to any real property taxes as to which petitioner was determined to have valid liens. Under the same authority, the court below rejected petitioner's claim for penalties. Neither of these holdings is at issue on this petition.

priority only with respect to taxes due and payable prior to the filing of the petition. The Bankruptcy Court agreed, holding that petitioner was entitled to secured treatment with respect to $327,231.45 of its claim, consisting of real property taxes for the 1978-79 tax year that had been assessed and perfected as liens before the most current bankruptcy petitions were filed in 1979. (App. 78a-83a). The Bankruptcy Court reasoned that "Section 546(b) allows certain liens to be perfected post-petition with priority over general unsecured and post-petition creditors, *provided the liens could have been perfected pre-petition under state law.*" (App. at 81a (emphasis in original)). But the court refused to accord secured status with respect to the remaining tax years, rejecting petitioner's argument that "post-petition liens can be filed for post-petition claims under 11 U.S.C. 546(b)." (App. at 82a). It therefore ordered petitioner to repay to the trustees, for ultimate distribution to respondents, the difference between the $500,000 petitioner had previously received and that portion of petitioner's claim representing the 1978-79 taxes. (App. 84a-89a).[4]

3. The District Court's Decision

The District Court affirmed, explicitly rejecting petitioner's position that its interest in collecting real estate taxes "has always existed" even as to future tax assessments and, therefore, allows for retroactive perfection of that interest under Section 546(b). (App. at 42a-77a). In *dicta*, the court observed that "[t]he overly expansive interpretation of § 546(b) for which the County argues does not comport with the limited purpose for which this exception to the trustee's avoidance powers was enacted." (App. at 57a). This discussion was not necessary to the court's holding, however, because the court also rejected petitioner's position "that the Suffolk County Tax Act . . . permits retroactive perfection of a pre-established interest in property." (App. at 56a). The court ruled that under the Act,

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4 That order, and the distribution to respondents of these funds and the balance of the $7.5 million proceeds, has been stayed pending appeals at each level and is currently stayed pending disposition of this certiorari petition.

real property taxes become due and payable on December 1 of each year and become liens that are automatically and simultaneously perfected. Prior to this time, the court held, the government possesses merely an "expectation," not a "ripened" interest "awaiting . . . a ministerial act of perfection." (App. at 56a).

4. The Court of Appeals' Decision

Though it reversed in part and affirmed in part, the Second Circuit similarly found state and local law to be controlling. (App. at 1a-41a). To be sure, the Court of Appeals "question[ed] whether 546(b) was ever intended to apply repeatedly during a prolonged bankruptcy." (App. at 30a). The court criticized petitioner's argument for "a rotating exception, which, every December 1, would add another lien at the front of the priority line, enabling the county to effectively collect on all its claims as if no bankruptcy petition had ever been filed . . . , a result clearly contrary to the intent of [C]ongress." (App. at 31a). Again, however, this discussion was *dicta*; the court held that there was no state law basis for petitioner's argument and, thus, there was no foundation for measuring it against federal bankruptcy law.

The court carefully scrutinized the applicable provisions of the New York Real Property Tax Law and the Suffolk County Tax Act, finding that the real property taxation process in Suffolk County commences each year on June 1, the tax status date "as of" which the property is valued. This is followed by several other steps in the valuation process, culminating on December 1 of each year when taxes become due and payable and a lien on the real property. (App. at 4a-7a). Unlike the two courts below it, the Court of Appeals deemed the earlier tax status date to be the date at which petitioner acquired an "interest in property" for purposes of Section 546(b)'s exception to the automatic stay, even though on that date the taxes are not due and payable nor is a lien created. Since the tax status date for the 1979-80 tax year occurred on June 1, 1979, before either bankruptcy petition was filed, the court held that under Section 546(b) petitioner was able to perfect its lien on December 1,

1979 as to those taxes, and that petitioner was entitled to secured status for taxes and interest for the 1979-80 tax year in addition to 1978-79. (App. at 26a-29a).

The court below, however, rejected on state and local law grounds petitioner's position that it had "an interest in the property that is 'ever-present' " and that automatically antedated the filing of the bankruptcy petitions as to all future tax years. (App. at 29a). The court stated that "the tax act at issue here makes absolutely no suggestion that the county's interest occurs any earlier than the tax status date." (App. at 34a). The court carefully noted that for this reason, its holding did not conflict with that of the Fourth Circuit in *Maryland Nat'l Bank*, *supra*, which held that Maryland law did admit of such an "ever-present interest." For these reasons, the court affirmed the decisions below denying petitioner secured status for any of the years after 1979-80. (App. at 32a-35a).

REASONS FOR DENYING THE WRIT

1. The Court of Appeals' Decision Rests on an Adequate and Independent State Law Ground and Therefore Should Not Be Reviewed by This Court

To grant petitioner the relief it seeks would require this Court to overturn the Court of Appeals' holding on an issue of New York and Suffolk County law, affirming the holdings of the two other courts below which also sit in New York. For this reason alone, this Court should deny the petition.

The governing standard was stated by this Court in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944): "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." In 1980, when this Court promulgated Rule 17.1 to guide review on certiorari, the Court omitted a prior provision (in predecessor Rule 19(1)(b)), that considered relevant a court of appeals' decision resolving "an important state or territorial question in a way in conflict with applicable state or territorial law." *See* R. Stern, E. Gressman,

S, Shapiro, *Supreme Court Practice* 212 (6th ed. 1986). Yet review of a state law issue is precisely what petitioner would have this Court do.

The automatic stay provision of the Bankruptcy Code stays "any act to create, perfect or enforce any lien against property of the estate" once the petition has been filed. 11 U.S.C. § 362(a)(4). Section 362(b)(3) excepts from the automatic stay "any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under Section 546(b)." 11 U.S.C. § 362(b)(3). Section 546(b), in turn, exempts from the trustee's power of avoidance "any generally applicable law that permits the perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection." 11 U.S.C. § 546(b).

It is undisputed that, in this case involving real property taxation, whether or not there is an "interest in property" allowing post-petition perfection of a lien is determined by reference to state and local law.[5] And the Court of Appeals determined that with respect to real property taxes in Suffolk County, New York, neither state nor local law gives petitioner any "interest in property" until June 1 of each tax year, the tax status date. The court held unequivocally that "the tax act at issue here makes absolutely no suggestion that the county's interest accrues any earlier than the tax status date." (App. at 34a). In reaching this holding, the court scrutinized the New York Real Property Tax Law and the Suffolk County Tax Act[6] and relied on no less than six state law decisions.[7]

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5 *See e.g., Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 84 (3d Cir. 1989) ("The determination whether a property tax has become a lien is determined according to state law."). Petitioner has not argued, neither in the petition nor in any of the courts below, that this is an issue of federal law.

6 *See esp.* App. at 26a-27a (citing N.Y. Real Prop. Tax Law § 302; Suffolk County Tax Act § 5).

(*Footnote 7 is on next page*)

The Court of Appeals also criticized petitioner's position as being inconsistent with Congress' purpose in enacting Section 546(b). (App. at 30a-32a). However, as the court recognized in "question[ing]" petitioner's position rather than rejecting it outright, the commentary was *dicta*. Only if local law provided for some sort of ongoing or "ever-present" property interest in the collection of future real estate taxes would it have been strictly necessary for the court below to decide whether such a law would be within the Section 546(b) exception to the automatic stay.

Thus, the only way for this Court to grant petitioner the relief it seeks is to determine that petitioner did have under local law an "ever-present interest" in future real estate tax collection—contrary to the holdings of three courts below, all sitting in New York. Because this is not an issue that needs to be addressed by this Court, certiorari should be denied.

2. The Court of Appeals' Decision Does Not Conflict With That of Any Other Court of Appeals

Petitioner urges that this Court grant certiorari because of an alleged conflict between the opinion of the Second Circuit, below, and the decision of the Fourth Circuit in *Maryland Nat'l*

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7 *Northville Indus. v. Board of Assessors*, 143 A.D.2d 135, 136, 531 N.Y.S.2d 592, 593 (2d Dep't 1988); *Adirondack Mountain Reserve v. Board of Assessors*, 99 A.D.2d 600, 601, 471 N.Y.S.2d 703, 705 (3d Dep't), *aff'd in part and appeal dismissed in part*, 64 N.Y.2d 727, 485 N.Y.S.2d 744 (1984); *In re Addis Co.*, 79 A.D.2d 856, 857, 434 N.Y.S.2d 489, 490 (4th Dep't 1980); *Rochester Hous. Auth. v. Sibley Corp.*, 77 Misc. 2d 205, 351 N.Y.S.2d 934 (Sup. Ct. 1974), *aff'd*, 47 A.D.2d 718, 367 N.Y.S.2d 969 (4th Dep't 1975); *R.P. Adams Co. v. Nist*, 97 Misc. 2d 374, 411 N.Y.S.2d 504 (Sup. Ct. 1978), *rev'd on other grounds*, 72 A.D.2d 908, 422 N.Y.S.2d 184 (4th Dep't 1979); *Roosevelt Nassau Operating Corp. v. Board of Assessors*, 68 Misc. 2d 183, 326 N.Y.S.2d 628 (Sup. Ct. 1970), *aff'd*, 41 A.D.2d 647, 340 N.Y.S.2d 871 (2d Dep't 1973).

Bank v. Mayor and City Council of Baltimore, 723 F.2d 1138 (4th Cir. 1983).[8] But petitioner is wrong, for two reasons.

In the first place, because the decision below and the Fourth Circuit decision both turn on state law, there is no conflict between them. *Maryland Nat'l Bank* accepts an "ever-present interest" argument based upon an interpretation of Maryland state and local law; the opinion of the court below holds that New York's taxing statutes create no such interest. This so-called conflict is hardly cause for this Court's intervention. *See Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari.").

Second, it is not at all clear that the holding of the *Maryland Nat'l Bank* case—as distinguished from its broad pronouncement of the taxing authority's "ever-present interest"—supports petitioner's claim, since the only issue actually raised in the case was the status of one year's taxes, which were not due and payable at the time the petition was filed but as to which the taxing process may well have begun. The justification for invoking this Court's certiorari jurisdiction is thus absent, since "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." R. Stern, E. Gressman, S. Shapiro, *supra*, at 196.

In *Maryland Nat'l Bank*, the debtor filed a voluntary petition for reorganization under Chapter 11 on October 31, 1979. The City of Baltimore thereafter asserted its right to be paid real property taxes and related fees for the years 1979-80 and 1980-81 from the proceeds of the sale of the property, and the trustee initiated an adversary proceeding to determine the city's rights. There was no dispute as to the 1979-80 taxes, since a lien for those taxes had been perfected against the property on July 1, 1979, well before the filing of the petition. But the parties dis-

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8 The petition also contends that the decision below conflicts with that of the Fifth Circuit in *Stanford v. Butler*, 826 F.2d 353 (5th Cir. 1987). As we show below, *Stanford* is irrelevant to this case.

puted the 1980-81 taxes, the lien for which would not have been perfected under Maryland law until July 1, 1980, after the bankruptcy petition had been filed. The court applied the Section 546(b) exception to the automatic stay and held that the city did have an enforceable security interest against the property for its 1980-81 taxes.

The court relied heavily on Maryland law in rendering this decision. In particular, the court found that Article 81, § 202(b) of the Maryland Code required that on sale of a property by a trustee, the proceeds were to be applied to taxes due and payable at the time of distribution even if at the time of sale the taxes had not yet become due and payable. The court also relied on Article 81, § 70 of the Maryland Code in reasoning that the "purchaser of real property cannot avoid the consequences of a property tax lien on the purchased realty where the lien represents taxes accrued before the date of sale." 723 F.2d at 1142. Construing these provisions together, the court held:

> "The State has retained the right to require first application of the proceeds from the sale of the property, to taxes due and payable by the time of distribution, a right that is immediately perfected, if not enforceable until the sale actually occurs, at the very moment an interest in the real estate—such as the Bank's mortgage, or a *bona fide* purchaser's fee simple holding—arises. *The interest, by force of the generally applicable law of Maryland, is ever-present*, and has been a recognized attribute of the State's property interest since a time well before 1978 when the deeds of trust effecting the security interest of the Bank came into being."

Id. (emphasis added).

The court below quite properly noted the fundamental similarities between its decision and *Maryland Nat'l Bank*. In each case, the court refused to focus woodenly on the date that the lien in question was perfected which "is only the last—not the first—step required to perfect" an interest in real property. *Id.* at 1143 (cited favorably by court below, App. at 29a). Each case looked to state law to determine the existence of an "interest in

property." The only legal distinction of consequence between the decisions is: "While the tax act in Maryland gave the fourth circuit significant indication that local government possessed a 'long-standing' interest in the property, . . . the tax act at issue here makes absolutely no suggestion that the county's interest accrues any earlier than the tax status date." (App. at 34a). *See also Matter of Isley*, 104 B.R. 673 (Bankr. D.N.J. 1989) (distinguishing *Maryland Nat'l Bank* on New Jersey law grounds and persuaded by decision below because of similarity between New York and New Jersey law).

Moreover, as noted by the Court of Appeals, even though in federal law *dicta* the court below criticized petitioner's "ever-present interest" argument, it is not at all clear that the Fourth Circuit would have decided the case below any differently than the Second Circuit. In both cases, the bankruptcy petition was filed just before the "date of finality" for that year's taxes. The court below found that the earlier "tax status date" for that year's taxes (which occurred before the filing of the petition) manifested the taxing authority's interest in the Racetrack property. It is impossible to tell from the *Maryland Nat'l Bank* decision whether a similar prior event in the tax valuation process for the one year at issue animated the court's reasoning that Maryland's interest in the property was "long standing." (See *App.* at 34a-35a).

The Fourth Circuit certainly did not have a situation before it that is comparable to this case. That court was asked to allow post-petition perfection of a claim for a single year's taxes, not for a "rotating exception" to "apply repeatedly during a prolonged bankruptcy." (App. at 30a-31a). Indeed, at least one rationale employed by the Fourth Circuit indicates that it might itself have agreed with the Second Circuit if faced with the same scenario.

The Fourth Circuit analogized the pre-petition secured creditor to a "hypothetical purchaser" of real estate (purchasing as of the date of the filing of the bankruptcy petition) who must know that taxes accruing at the date of purchase but not yet due and payable would be the purchaser's responsibility and who

"would factor that consideration into the equation in determining what he would be willing to pay." *Maryland Nat'l Bank*, 723 F.2d at 1142-43, n.10. It is doubtful in the extreme that the same hypothetical purchaser would calculate not one but six future accruing years of tax liability, during which time it would have no use of the property. For these reasons, the Fourth Circuit decision is not only inapposite because of its reliance on state law, but is distinguishable on its own terms. *See Wisconsin Elect. Co. v. Dunmore Co.*, 282 U.S. 813 (1931) ("It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certioriari is dismissed as improvidently granted.").

Lastly, this Court need not concern itself with petitioner's make-weight argument that the decision below is in conflict with the Fifth Circuit decision in *Stanford v. Butler*, 826 F.2d 353 (5th Cir. 1987). The Fifth Circuit did not, in a way that has the slightest bearing on this case, follow *Maryland Nat'l Bank*. No post-petition taxes were at issue in *Stanford v. Butler*. *See* 826 F.2d at 354, n.1. The language quoted in the petition, taken entirely out of context by petitioner, responds to an argument that only recorded, as opposed to unrecorded, statutory liens are entitled to secured status. The court held simply that perfected pre-petition statutory liens are secured for purposes of the Bankruptcy Code even if they are unrecorded. The opinion cites *Maryland Nat'l Bank* solely for the unremarkable propositions that the "Bankruptcy Code continue[s] to treat statutory liens created by state law for taxes as secured claims," *id.* at 355, and that "Section § 546(b) permits perfection after bankruptcy filing," *id.* at 357. It hardly adopts the alleged "approach of the Fourth Circuit" with respect to the issues in the present case, as petitioner asserts. (Petition at 13).

Thus, what remains of the purported "intolerable conflict" urged by the petitioner (Petition at 2) is a dispute between, on the one hand, *dicta* in the decision below and, on the other hand, a holding of the Fourth Circuit based on distinguishable facts. Under these circumstances, there is no basis or sound reason for this Court to accept the case.

3. The Court of Appeals' Rejection of the "Ever-Present Interest" Argument Is Entirely In Keeping With The Clear Intent of Congress and Is Endorsed by the Only Other Court of Appeals to Reach the Issue

A final reason why this Court should not grant the petition is simply that the Court of Appeals' *dicta* in rejecting the petitioner's "ever-present interest" argument is overwhelmingly correct. The clear weight of the legislative history supports the decision below. Moreover, the only other court of appeals to reach the question, the Third Circuit in a recent decision, strongly endorsed the views of the court below.

Petitioner's position abrogates no less than four central, unambiguous purposes of Congress in enacting the Section 546(b) exception to the automatic stay. First, Congress intended that any exceptions to the automatic stay be interpreted narrowly. As the court below held, there simply is no provision in the applicable state statutes supporting petitioner's assertion of an "ever-present interest," let alone a provision to be construed narrowly.

Second, Section 546(b) was "not designed too [sic] give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases." H.R. Rep. No. 595, 95th Cong. 1st Sess. 371, *reprinted in* 1978 U.S. Code Cong. & Admin. News 6327. Petitioner's "interpretation would effectively remove the taxing arms of local government from the controlling provisions of the bankruptcy code, a result clearly contrary to the intent of [C]ongress." (App. at 31a).

Third, Congress intended that all creditors, including local government, be treated fairly and equally. *See In re Guterl Special Steel Corp.*, 95 B.R. 370 (Bankr. W.D. Pa. 1989). That purpose "would be effectively destroyed if, for every year of the bankruptcy proceeding, the county were granted priority over all secured creditors and allowed to collect on its tax liens as they attach," (App. at 30a), while secured creditors could not foreclose or otherwise benefit from the use of the property.

Finally, "[t]he purpose of [Section 546(b)] is to protect, in spite of the surprise intervention of [the] bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection." *House Report*, *supra* at 371, reprinted in U.S. Code Cong. & Admin. News at 6327. This affords lien claimants an "opportunity to leapfrog back in time so that *the consideration they furnished* may not become a windfall for a supervening creditor." *In re Electric City, Inc.*, 43 B.R. 336, 340 (Bankr. W.D. Wash. 1984) (emphasis supplied). Or, as the court below put it, Section 546(b) was intended "as a one-time exception for the creditor *who gave value* but has not yet perfected its lien." (Emphasis supplied). Under no conceivable stretch of the imagination can it be contended that petitioner gave value, prior to the filing of the bankruptcy petition, for tax years long in the future.

It should also be noted that the "ever-present interest" analysis in *Maryland Nat'l Bank* has gained no allies among the circuit courts since the decision in 1983. To the contrary, the only court of appeals decision other than *Maryland Nat'l Bank* and the court below addressing the federal law issue urged by the petition is *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80 (3d Cir. 1989). In *Equibank*, the court rejected a municipality's claim for 1987 real property taxes which became liens in July 1986, after the April 1985 petition was filed. Although it, too, relied on local law, the court disposed of the municipality's citation of the *Maryland Nat'l Bank* case with the observation that the reasoning of the Second Circuit in this case was "far more convincing." *Id.* at 86. The petition should thus be denied for the additional reason that there appears to be little danger that the expansive reading of the Fourth Circuit's decision urged by the petitioner is likely to be adopted by other appellate courts.

CONCLUSION

The petition should be denied.

Dated: New York, New York
December 22, 1989

Respectfully submitted,

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RIEF

No. 89-900

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

In Re PARR MEADOWS RACING ASSOCIATION, INC.,
Petitioner in Bankruptcy.

SUFFOLK COUNTY TREASURER,
Petitioner,
V.

JAMES BARR, as Trustee of PARR MEADOWS RACING ASSOCIATION, INC. and HARVEY L. GOLDSTEIN, as Trustee of RONALD J. PARR, RONALD J. PARR,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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December 29, 1989.

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BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Like many other communities across the nation, the City of New York ("City") relies heavily on real property tax revenue. Real estate taxes in the last year amounted to approximately 6.5 billion dollars, constituting 41.6% of the revenue derived just from City sources alone, and 24.8% of the total revenue inclusive of Federal and State contributions. Since every dollar is needed for providing essential governmental services, a decision which severely restricts collection of duly imposed taxes poses a serious threat to municipal functions.

The authority for local taxation in New York State is derived from the New York Real Property Tax Law. Pursuant to New York Real Property Tax Law §300, all real property within the State is subject to taxation unless specifically exempted therefrom by law. The New York Municipal

Home Rule Law §10, empowers localities to design individual administrative procedures and to implement time-tables for the preparation and collection of taxes. The City Charter and Administrative Code, however, in all essential respects provide the same procedures as those set forth in the Suffolk County Charter. The decision of the Court below, therefore, has serious impact on the City as well as on other similarly situated taxing units and seriously impedes their ability to collect necessary real property taxes during a bankruptcy.

The decision is vulnerable for other reasons as well. It disregards the plain language and intent of the governing statute, 11 U.S.C.§546(b), and appears to conflict with a decision of the Court of Appeals in another jurisdiction on the very same vital issue. Maryland National Bank v. Mayor and City Council of Baltimore, 723

F.2d 1138 (4th Cir. 1983). This unsettled state of the law creates further difficulties and the lack of uniformity complicates collection of taxes even more. Since the question presented by the appeal here is a frequently recurring one of considerable administrative importance to the City as well as to other similarly situated taxing authorities, the City respectfully submits this brief, pursuant to Rule 36.4 of the Rules of this Court, in support of the Suffolk County Treasurer's petition for writ of certiorari.

ARGUMENT

THE WRIT SHOULD BE GRANTED IN ORDER TO RESOLVE THE ISSUE OF WHETHER TAXING AUTHORITIES CAN QUALIFY UNDER THE EXCEPTION TO THE AUTOMATIC STAY THAT IS AUTHORIZED BY §§362(b)(3) AND 546(b) OF THE CODE AND THUS ALLOW POST PETITION REAL ESTATE TAXES TO BE TREATED AS SECURED CLAIMS.

In the instant case, review by this Court is warranted because the issue presented is a recurring one of public importance and nationwide significance. The Court below, in affirming a judgment which disallowed priority lien status for some of the real estate taxes that became due after the debtor's bankruptcy petition on June 12, 1979, held that Suffolk County had valid tax liens only for the first two tax years at issue. In re Parr Meadows Racing Association, Inc., 880 F.2d 1540 (2d Cir.

1989). The decision was predicated on 11 U.S.C. §362(a)(4), which, in pertinent part, provides:

> . . . a petition filed under . . . of this title . . . operates as a stay, applicable to all entities, of . . . (4) any act to create, perfect, or enforce any lien against property of the estate.

However, 11 U.S.C. §362(b)(3) provides that the filing of a petition does not operate as a stay:

> . . . of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) . . .

Section 11 U.S.C. §546(b) provides further:

> [t]he rights and powers of the trustee under . . . 545 [avoidance power] . . . are subject to any generally applicable law that permits perfection of an interest in property to

> be effective against an entity that acquires rights in such property before the date of such perfection.

Thus, where there is a generally applicable law that permits perfection to be valid against an intervening purchaser, as is true in the instant case, "then the trustee should stand in no better shoes than such an intervening purchaser." Maryland, 723 F.2d at 1143.

The Court below held that Suffolk County had a valid tax lien for the 1978-79 tax year because it had completed the entire taxation process before the bankruptcy petition was filed. Parr Meadows, 880 F.2d at 1548. It relied on 11 U.S.C. §546(b) in finding that the lien for the 1979-80 tax year was also valid. In this connection, the Court stated that "(t)he county acquired an 'interest in property' on June 1, 1979, . . . twelve days before the

first petition in bankruptcy was filed." Id. at 1548. But for the remaining years, the Court found that Suffolk County did not possess a sufficient "interest in property" to qualify for the 11 U.S.C. §546(b) exception and thus the creation and perfection of each of these later liens violated the automatic stay. Id. at 1548. Therefore, the Court found that these liens were void and Suffolk County was an unsecured creditor for the amount due for each of those years. Id. at 1549.

This decision deviates from the holding of the Fourth Circuit in Maryland [1] and,

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[1] The question whether the Bankruptcy Code allows priority lien status for real estate taxes that become due after the date of debtor's bankruptcy petition has sharply divided the lower courts. The third Circuit recently followed Parr Meadows, in declining "to find any state interest cognizable for purposes of §546(b) existing as of the date (Footnote Continued)

also, ignores the plain meaning of the statute. In Maryland the Court held that Congress, by enacting 11 U.S.C. §546(b), intended that "the mere intervention of petition in bankruptcy should not be permitted to defeat what would otherwise be a valid security interest in property." Id. at 1143. The City, like Suffolk County, under generally applicable law has a prepetition interest in the property. That interest establishes that no entity acquiring rights in the real property could prevent the subsequent perfection of the taxing authority's interest to secure payment of its real property taxes. The City Administrative Code §11-301 provides that:

> All taxes and all assessments and all

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of the bankruptcy filing . . ." Equibank v. Wheeling - Pittsburgh Steel Corp., 884 F.2d 80 (3d. Cir. 1989).

> surcharges and water rents, and the interest and charges thereon, which may be laid or may have heretofore been laid, upon any real estate now in the city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges.

Accordingly, the City each year on the date when the real estate tax becomes due and payable has a lien which is of paramount superiority.

The Court in Maryland recognized that the mortgagee knew that real estate taxes would have to be paid "if the need to foreclose should ever arise." Id. at 1146. But the Court below, in ruling as it did, allowed the bank to avoid real estate taxes as a consequence of the bankruptcy of the borrower. According to Maryland, this results in ". . . pure manna from heaven in the form of an unanticipated and unmerited

benefit . . . in the mortgagee's favor, and no congressional objective would be served." Id. at 1146.

Additionally, the interpretation of 11 U.S.C. §546(b) by the Court below contravenes the plain meaning of the statute. It erroneously focuses on the date that the County had a real and identifiable interest in the property rather than focusing on the effect of the lien once it becomes effective. The appropriate inquiry is whether the lien, once perfected, has paramount superiority over all other interests in the property. If this is so, then the trustee cannot avoid it.

A Bankruptcy Court recently found that 11 U.S.C. §546(b) itself does not employ the concept of "relation back" and the Court saw "no reason to read that concept into it." In In re Microfab, 105 B.R. 152 (Bkrtcy. D. Ma. 1989), the Court stated:

> (i)n view of the clarity of this language, I see no reason to construe §546(b) so narrowly as to apply only to lien statutes that employ the legal fiction of 'relation back.' (footnote omitted) To do so would be to elevate form and semantics over substance in order to defeat a statute that clearly requires just the opposite result. Id. at 158.

It has long been recognized that a lien on real estate is distinct from a lien on personal property or any other encumbrance. In Osterburg v. The Union Trust Company of New York, 93 U.S. 424 (1887), this Court stated:

> A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the res without regard to individual ownership,

> and when it is enforced by sale pursuant to the statute, prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title. Id. at 428.

Real estate is "immovable and ever present". Hence, "the state's interest in the property for the purposes of real estate taxation is a very real and not-to-be doubted interest that pre-exists a petition in bankruptcy." Maryland, 723 F.2d at 1144 n.14.

Moreover, real estate taxes, as distinct from personal property taxes, provide a direct benefit to the property on which they are levied because they provide for such municipal services as police, fire, sanitation, etc. They also indirectly benefit the property by providing revenue for the benefit of the community at large. In re Klefstad, 95 B.R. 622, 625 n.5 (Bkrtcy. W.D.Wis 1988). Consequently, real estate

taxes fall into a different category from other encumbrances. An argument may also be made that the payment of real estate taxes are necessary expenses which benefit the mortgagee by protecting its collateral.[2]

The instant petition offers this Court an excellent opportunity to resolve the issue of whether taxing authorities can qualify under the exception to the automatic stay that is authorized by 11 U.S.C. §§362(b)(3) and 546(b), thereby allowing post petition real estate taxes to be treated as secured claims. Moreover, the issue presented here affects not only taxing authorities but other

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[2] 11 U.S.C §506(c) provides:
(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

entities where, under applicable law, they may assert a lien that takes priority over an interest in such property that arose before the date of such perfection, e.g. environmental superliens for cleaning contaminated property.

The City and other taxing authorities across the nation need to know for budget planning whether real estate taxes that accrue post petition can be treated as secured claims. It is respectfully urged that in view of the frequent recurrence of this issue, a uniform nationwide rule is mandated. This Court should act toward creation of that uniformity.

CONCLUSION

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI.

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